91-1659

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

In the Matter of the Estate of

EUDOKIA BUHAROV, Deceased.

VIRGINIA BYRD and TERRAN T. STEINHART,

Petitioners,

vs.

NICHOLAS BUHAROV, TANYA BUHAROV and

ANATOLIY IVANOVICH KALASHNIKOV,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 1

PETITION FOR WRIT OF CERTIORARI

EVAN S. COHEN
Counsel of Record
COHEN AND LUCKENBACHER
740 North La Brea Avenue
Los Angeles, California 90038-3339
213/938-5000

Attorney for Petitioners

FILED
1992
CLERK

QUESTIONS PRESENTED

1. When an appellant raises as her primary issue on appeal, the judicial misconduct of the trial judge, is it a denial of due process for the appellate court to impose in excess of $24,000 in monetary sanctions on the appellant and her attorney for allegedly prosecuting a frivolous appeal, thereby subjecting the attorney to possible professional discipline, where the only notice thereof is a request for the imposition of such sanctions in the respondent's brief, and the appellant's attorney is required defend both the appellant and himself against the charge during the argument on the merits of the appeal, rather than the appellant and attorney being afforded a separate hearing on the charge, in which they are each given the opportunity to be represented by their own independent counsel?

2. When during the summation argument of appellant's attorney, in the presence of the jury, the trial judge on two separate occasions interrupts the attorney, and angrily, slamming his hands on his desk, half standing and leaning forward, with shouting voice, derogates the attorney for allegedly engaging in improper argumentation, does such judicial conduct deprive the appellant of due process of law?

LIST OF PARTIES

VIRGINIA BYRD -- Petitioner herein, will proponent in the trial, and appellant in the state court appeal.

TERRAN T. STEINHART -- Petitioner herein; and attorney for Virginia Byrd as will proponent in the trial, and appellant in the state court appeal.

NICHOLAS BUHAROV and TANYA BUHAROV -- Will contestants in the trial, respondents in the state court appeal, and respondent herein, represented by Scott McWhinney, Esq., McWhinney & McWhinney, Attorneys at Law.

ANATOLIY IVANOVICH KALASHNIKOV -- Will contestant in the trial, respondent in the state court appeal, and respondent herein, represented by Irwin Gostin, Esq., APC.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 1

PETITION FOR WRIT OF CERTIORARI

Petitioners Virginia Byrd and Terran T. Steinhart, Esq. respectfully pray that this honorable court issue a writ of certiorari to review the judgment and

opinion of the California Court of Appeal, Second Appellate District, Division 1, issued on October 15, 1991.

REFERENCE TO OPINION BELOW

The judgment and opinion of the California Court of Appeal, Second Appellate District, Division 1, was not published, and is reprinted in Appendix A.

JURISDICTION OF THIS COURT

The judgment and opinion of the California Court of Appeal, Second Appellate District, Division 1, was entered on October 15, 1991. A Petition for Rehearing to that Court was denied by an order issued on November 14, 1991, two justices voting to deny, and one justice voting to grant. A copy of the this order is reprinted in Appendix B. A Petition for Review to the California Supreme Court (the highest court of the state) of the aforesaid judgment and opinion of the

California Court of Appeal was denied by an order issued on January 8, 1992, a copy of which order is reprinted in Appendix C.

Petitioners believe that jurisdiction to review the judgment and opinion in question by writ of certiorari is conferred on this Court by 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent portions of the constitutional provisions, statutes and rules of court involved in the case are the following:

1. United States Constitution, Amendment XIV, relevant portions of which are set forth in Appendix D.

2. California Code of Civil Procedure, Section 907 and California Rules of Court, Rule 26, relevant portions of which are set forth in Appendix E.

3. California Business and Professions Code, Section 6068, relevant

portions of which are set forth in Appendix F.

STATEMENT OF THE CASE

Procedural Background

Virginia Byrd ("Ms. Byrd") offered for probate in the Los Angeles Superior Court six holographic wills, dated March 3, March 4, March 23, April 11, and two dated May 1, 1981, and one formal, witnessed typewritten will dated April 1, 1981, each of which wills named Ms. Byrd as sole beneficiary of the estate of decedent, Eudokia Buharov ("Ms. Buharov"). Copies of the seven wills are contained in Appendix G. Will contests to all of the wills were filed by: (1) Nicholas Buharov and Tanya Buharov, the alleged nephew and niece of Ms. Buharov's husband, who predeceased her by 10 years, and (2) Anatoliy Ivanovich Kalashnikov, one of a number of alleged relatives of Ms. Buharov residing in

Russia. In late 1988 a trial was held on the will contests.[1] Based on a jury verdict that the proffered wills were forgeries, the trial court made an order denying probate of the wills, from which order Ms. Byrd appealed to the California Court of Appeal, Second Appellate District.

While the case was pending on appeal, after Ms. Byrd, who was impecunious, ultimately obtained a private loan commitment to pay the several thousand dollar cost of the reporter's transcript, it was discovered that all but a minuscule portion of the reporter's notes were lost. Ms. Byrd thereupon moved the appellate court to exercise its discretion to grant a new trial, which is a statutory option in

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[1] A trial herein was original held in 1984. However, the case was declared a mistrial when prior to the completion of the trial, the trial judge took a disability retirement due to a condition of retrograde amnesia caused by a vehicular accident.

California under such circumstances. When that motion was denied, relegating Ms. Byrd to proceed by way at settled statement, she ascertained that the trial judge had previously retired. She thereupon made a second motion to the appellate court for new trial on the ground that the California rule of court which provides that when the trial judge is unavailable to settle a statement, the task can be accomplished by another judge of the court, is invalid as violating due process of law. When that motion was denied, Ms. Byrd thereupon moved first, the trial court, and then the appellate court, for permission to proceed by way of settled statement, using a judge other than the trial judge. Both of those motions were denied, thereupon relegating Ms. Byrd to presenting the record of oral proceedings at trial by reference to summaries of testimony contained in the

moving and opposition papers filed with reference to Ms. Byrd's previous motions for new trial in the trial court and appellate court.

The appellate court affirmed the judgment of the trial court by the unanimous vote of the three-justice panel. In its opinion (see Appendix A) the appellate court found that the appeal was frivolous and taken solely to harass and delay. The court thereupon concluded that an award of sanctions against Ms. Byrd and her attorney was appropriate, and awarded sanctions in the amount of $24,000, plus costs of appeal, amounting to another few hundred dollars.

Ms. Byrd thereupon filed a Petition for Rehearing, Petition for Disqualification of Justices, and Petition to Obtain Tape Recording of Proceedings [i.e., the appellate oral argument], which was denied

by a vote of two to one (see Appendix B). Finally, Ms. Byrd filed a Petition for Review to the California Supreme Court, the highest court of the state. That petition was also denied (see Appendix C).

Because there was no reporter's transcript nor settled statement in this appeal, in the appellate briefs of the opposing parties, there were disparate accounts of the oral proceedings below on certain issues of trial evidence and procedure. In its opinion, characteristically, the appellate court arbitrarily resolved such disparities by adopting the account set forth in the brief of will contestant Kalashnikov.[2] The appellate

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[2] The appellate court's adoption of these factual accounts is denominated arbitrary, because the court had absolutely no evidentiary basis upon which to adopt such accounts; and moreover, the court declined to revise assertions of fact in its opinion which were shown to be wrong by sworn testimony, uncontradicted by any other sworn testimony, offered in support

court's various factual mistakes in this regard were pointed out in Ms. Byrd's petition for rehearing, which was denied by a vote of two to one.[3]

Ms. Byrd's petition for rehearing to the Court of Appeal.

[3] Pursuant to the rules of this Court, the petitioners are required to attach as an appendix, a copy of the opinion of the California Court of Appeal. However, because petitioners are admonished by the rules to be brief, it would be improper to attach copies of Ms. Byrd's aforesaid petitions for rehearing and review. In those petitions, Ms. Byrd comprehensively responded to what she respectfully contends are several errors of fact and law contained in the appellate court opinion, including errors in the court's factual characterization of what transpired during the appellate argument. In order to substantiate her contention regarding the court's mischaracterization of the content of the appellate argument, concurrent with her petition for rehearing, Ms. Byrd petitioned the appellate court to obtain a copy of the tape recording of the argument, which the court makes for its own internal use. However, this request was denied by the court.

In voting to grant a rehearing, it appears that at least one of the three appellate justices found the petition for rehearing persuasive. This is significant, because an appeal may be deemed to be frivolous under California law only when

The federal questions sought to be reviewed herein were raised in the Los Angeles Superior Court (the trial court), the California Court of Appeal, Second Appellate District, and/or the California Supreme Court, and were passed upon by those courts as follows:[4]

1. Question 1 was first raised in Ms. Byrd's petition for rehearing, in which she argued that: The rule that a request for sanctions made in an appellee's brief is "fair warning that such sanctions would be

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any reasonable attorney would agree that the appeal is totally and completely without merit. See Argument II, below. It would appear that the justice who voted to grant a rehearing did not agree that the appeal was totally and completely without merit, because if it were, it would be a waste of the appellate court's time to rehear the appeal. Thus, the two to one vote on the petition for rehearing is evidence that the appeal cannot properly be deemed to be frivolous.

[4] The questions referred to are questions 1 and 2 set forth in Questions Presented on page i, above.

considered by the court" is not constitutionally adequate prior notice to a counsel and his client; and that a hearing on the issue of sanctions, held simultaneously with the hearing on the merits of the appeal, is not a constitutionally fair hearing of the sanctions issue. Declaration of Terran T. Steinhart in Support of Petition for Rehearing, pp. 4-19; Memorandum of Points and Authorities, Argument I.C., p. 37. The petition was denied. See Appendix B. Finally, Question 1 was raised in Ms. Byrd's petition for review to the California Supreme Court, Argument I.A., pp. 9-10. The petition was denied. See Appendix C.

2. Question 2 was first raised in Ms. Byrd's motion for new trial in the trial court, in which Ms. Byrd urged that the trial judge's angry, shouting denunciation of her attorney during his summation

argument in the presence of the jury constituted judicial misconduct, amounting to prejudicial error. See Declaration of Terran T. Steinhart in Support of Motion for New Trial, pp. 1-6, and Memorandum of Points and Authorities in Support of Motion for New Trial, pp. 17-21, located at Clerk's Transcript pp. 306 and 267, respectively. The motion was denied. See Clerk's Transcript, p. 316. Question 1 was next raised before the California Court of Appeal, Second Appellate District, Division 1 as Ms. Byrd's primary ground of appeal. See Appellant's Opening Brief: Statement of the Case, pp. 11-16; Argument I, pp. 19-34. The Court of Appeal affirmed the judgment of the trial court. See Opinion, Appendix A. Question 2 was next discussed in Ms. Byrd's petition for rehearing to the appellate court. See Petition for Rehearing, etc., Argument I.B., pp. 27-29.

The petition was denied. See Appendix B. Finally, Question 2 was raised in Ms. Byrd's petition for review to the California Supreme Court, Argument III. The petition was denied. See Appendix C.

Factual Background

Decedent, Eudokia Buharov, was born in Russia and married there at about age 15. She and her husband immigrated to the United States. They lived first in San Francisco, and then in Los Angeles.

Ms. Buharov's husband, George, died in 1971, leaving an estate of approximately $1,000,000 by will to Ms. Buharov.

Ms. Buharov died in her apartment in the night/morning of May 1/2, 1981 of natural causes. Although she was in her late eighties, her death came as a surprise as she had no apparent life-threatening illness at the time.

Prior to her death, she lived in the

United States for at least 50 years, and became a citizen of this country. Until the day of her death, she managed her own personal and business affairs, including managing the small four-unit apartment house in which she lived.

Ms. Byrd met Ms. Buharov approximately a year before Ms. Buharov's death, during the better part of which year the two women carried on a relationship by telephone. During what turned out to be the last four months of Ms. Buharov's life, the two women developed a deep affection for one another and spent many hours together, day and night, virtually every day. Ms. Byrd was approximately 45 years younger than Ms. Buharov.

The closeness of the friendship of the two women was corroborated by the testimony of Joseph Frank Becker, a neighbor and friend of Ms. Buharov during the last ten

years of her life, and Loretta Economides, a next door neighbor and friend of Ms. Buharov for 40 years preceding her death. Both of these witnesses testified that the two women were indeed friends in the true sense of the word. Mr. Becker testified that Ms. Buharov often spoke affectionately of Ms. Byrd, referring to her as "Virginia, my adopted daughter." Ms. Economides testified that the two women were good friends, that Ms. Buharov spoke about Ms. Byrd many times, having very special affection for her, and that Ms. Byrd in return was very devoted to Ms. Buharov. The friendship of the two women was further corroborated by the testimony of Virginia McShane, a neighbor and friend of Ms. Buharov during the last 17 years of her life.

During the last two months of her life, Ms. Buharov made out at least six

holographic wills, and one formal typewritten witnessed will. In all of the wills, she left her entire estate to Virginia Byrd.[5] Also, in early April 1981, Ms. Buharov signed and had notarized a General Power of Attorney in favor of Ms. Byrd, and a Quitclaim Deed to her small four-unit apartment house, by which she conveyed title to Ms. Byrd.

On March 4, 1981, and again on May 1, 1981, Ms. Buharov gave to Mr. Becker one of her holographic wills (see copies in Appendix G). Each had a religious message on the reverse side. Mr. Becker personally observed her writing both of these wills,

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[5] The trial court excluded material opinion testimony by Anne Saravo, a doctor of psychology, specializing in geriatrics, that Ms. Buharov's making out this number of wills during what turned out to be the last two months of her life was reasonable and understandable under the circumstances, one of which was Ms. Buharov's desire that her dispositive intention be known and preserved. This exclusion of evidence was noted as error before the appellate court.

as well as another holographic will on May 1, 1981, which he saw Ms. Buharov place under a bowl on her dinette table. Mr. Becker kept both of the wills he received from Ms. Buharov as keepsakes. Because he did not know what holographic wills were at the time, he thought the few words about Virginia Byrd were merely notes by Ms. Buharov. Years later, he first learned that they were legal wills.

On April 1, 1981, Ms. Buharov signed a formal typewritten will in the presence of will witnesses Andrea Burns and Kirk Besoyan. Ms. Byrd was excused from producing Mr. Besoyan as a witness at trial, because although she made diligent efforts to locate him, she was unable to do so. However, Andrea Burns, the other will witness, testified to the signing and witnessing of the typewritten will. Ms. Burns was a very attractive,

intelligent, credible witness, who was formerly a legal secretary. She testified that Ms. Buharov signed the will in her presence and in the presence of Mr. Besoyan, and that they both signed as witnesses. She identified the will instrument as the one that was signed by Ms. Buharov and that was signed by the two witnesses. Further, she gave an accurate physical description of Ms. Buharov and identified various photographs of Ms. Buharov that were received in evidence as exhibits at trial. Finally, she testified in detail to the entire scenario which occurred at the will signing and witnessing, including her conversation with Ms. Buharov.

In contravention of the aforesaid authentication of the genuineness of the formal, typewritten will and three of the six holographic wills by percipient

witnesses to the making and signing of the same, the only evidence adduced by the will contestants was the opinion testimony of two handwriting experts. One, Mr. Bowman, testified that the questioned wills were not signed by Ms. Buharov; but he qualified his opinion by stating that he, like any handwriting expert, could be wrong. The other, Mr. Conway, in contradistinction to Mr. Bowman, testified that he was certain that none of the questioned wills was signed by Ms. Buharov.[6] Handwriting expert, Ms. Cameron, on the other hand, testified that all of the questioned wills were signed by Ms. Buharov, and that the handwriting/handprinting on the holographic

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[6] Over Ms. Byrd's objection that Mr. Conway should be required to testify in open court and be subject to cross-examination in the presence of the jury, the court permitted Mr. Conway's videotaped deposition to by shown to the jury. This ruling was noted as error to the appellate court.

wills was also that of Ms. Buharov.

Ms. Buharov's predeceased husband, George, had a nephew and a niece, Nicholas and Tanya Buharov, who resided in the San Francisco area. They are children or stepchildren of George's brother, Kenneth. In her holographic will of April 11, 1981, referring to them, Ms. Buharov states that they are not children of Kenneth. She mentioned them in certain of the holographic wills, and explicitly excluded them, except for giving them one dollar each. She did not respect or esteem them well. This fact was established by the uncontradicted testimony of at least two of Ms. Buharov's friends.

The thrust of the substantial evidence adduced by Ms. Byrd was to the effect that: Ms. Buharov was a woman of intellect and sound mind, who of her own volition chose to leave her estate to her dear friend and

helper, Ms. Byrd, who was a comfort and joy to her in the last few months of her life; rather than letting it go by intestate succession to the alleged heirs in Russia, with whom there was no evidence that she had contact for many years, and the alleged niece and nephew of her deceased husband, who were not even in her bloodline, and whom she did not esteem well. Further, three of Ms. Buharov's friends (Mr. Becker, Ms. Economides and Ms. McShane), all of whom were close enough to have conversed with Ms. Buharov on the day before her death, testified on behalf of Ms. Byrd, knowing that their testimony would assist Ms. Byrd in her claim that Ms. Buharov had willed her estate to Ms. Byrd. These close friends of Ms. Buharov certainly were in a much better position than the jury, the trial judge and the appellate court to know Ms. Buharov's personality and her

relationship with Ms. Byrd, knowing that Ms. Buharov's willing of her estate to Ms. Byrd was consistent with that personality and that relationship.

ARGUMENT

I. IT IS A DENIAL OF DUE PROCESS OF LAW FOR AN APPELLATE COURT TO IMPOSE $24,000 IN SANCTIONS UPON AN APPELLANT AND HER ATTORNEY FOR ALLEGEDLY PROSECUTING A FRIVOLOUS APPEAL, WHERE THE ONLY NOTICE THEREOF IS A REQUEST FOR SUCH SANCTIONS IN THE RESPONDENT'S BRIEF, AND THE APPELLANT AND HER ATTORNEY ARE NOT AFFORDED A SEPARATE HEARING ON THE CHARGE, IN WHICH THEY ARE EACH GIVEN THE OPPORTUNITY TO BE REPRESENTED BY THEIR OWN INDEPENDENT COUNSEL.

California law provides that if it appears to an appellate court that an appeal is frivolous or was taken solely for delay, it may impose upon the offending

attorney and/or party such penalties, including monetary damages, as may be just. California Code of Civil Procedure, Section 907; California Rules of Court, Rule 26. (see Appendix E).

Pursuant to California Business and Professions Code, Section 6068 (see Appendix F), a California attorney is required to report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of the imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than $1000. Upon such reporting, a California attorney is subject to professional discipline.

In the instant case, there is presently an investigation pending by the State Bar as to the possible disciplining of Mr. Steinhart, Ms. Byrd's

trial/appellate, as a result of the imposition of the judicial sanctions against him for allegedly prosecuting a frivolous appeal. Furthermore, by reason of the imposition of those sanctions, Mr. Steinhart and Ms. Byrd are potentially subject to payment of in excess of $24,000 to the opposing parties and their attorneys.

The requirements of procedural due process apply whenever deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property are involved;[7] and procedural due process fundamentally requires prior notice of the contemplated deprivation and an opportunity for a hearing. Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). Property

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[7] For text of Fourteenth Amendment, see Appendix D.

interests protected by procedural due process include money. Ibid. Further, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 573. Therefore, the requirements of procedural due process are applicable when an appellate court considers the imposition of monetary sanctions for the prosecution of a frivolous appeal as against an appellant or the appellant's attorney.

In its opinion (Appendix A), the Court of Appeal held that a request for sanctions made in a respondent's brief is "fair warning that such sanctions would be considered by the court." (See Appendix A) This holding deprives Ms. Byrd and her counsel of due process of law, because such notice does not comport with the

requirements of due process. Further, combining a hearing on the merits of the appeal with a hearing on whether or not the appellant's attorney and/or the appellant should be sanctioned for prosecuting a frivolous appeal is also a denial of due process.

The issue of the imposition of sanctions not only constitutes a potential deprivation of property, but as to the attorney, a slur on his professional standing, subjecting him to possible professional discipline. When an appellant's counsel comes to argue the merits of an appeal, he comes to represent his client, not to defend himself as against a charge of having prosecuted a frivolous appeal. Further, an appellant's attorney is entitled to representation by his own attorney in a hearing in which his professional standing is put at issue, and

in which he may be deprived of property by way of monetary sanctions. Moreover, the appellant is entitled to representation by counsel, independent of her appellate counsel, on the issue of whether sanctions should be imposed for prosecution of a frivolous appeal; and if so, whether they should be imposed solely against the attorney, and not against the appellant.

A request for sanctions made in a respondent's brief does not give adequate notice for such preparation and appropriate legal representation to either the attorney or the appellant. Furthermore, if an appellate attorney is required to defend himself as against an accusation of having prosecuted a frivolous appeal in a hearing in which he has come to represent his client's interests on the merits of the appeal, he is put in a potential conflict of interest position, in which to defend

himself, he merely has to demonstrate that any one of his arguments has debatable merit;[8] whereas on behalf of his client, he is required to tackle the larger task of persuading the appellate court to reverse the judgment of the lower court on the merits.

Furthermore, in the instant case, specific notice and a special evidentiary hearing on the issue of sanctions was mandated by the requirements of due process because of the need to resolve conflicts in the disparate accounts of the parties as to the oral proceedings at trial, which arose because there was no reporter's transcript nor settled statement; thereby affording petitioners the opportunity to present testimony and to cross-examine any witnesses offering contrary accounts,

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[8] See In Re Marriage of Flaherty, 31 C.3d 637, 649, 183 C.R. 508, 516 (1982).

rather than permitting the appellate court to arbitrarily adopt the hearsay statements in the brief of respondent Kalashnikov.[9]

In Re Marriage of Flaherty, 31 C.3d 649, 183 C.R. 508 (1982), the California Supreme Court held:

> "The right to pursue one's chosen profession free from arbitrary state interference also is protected by the due process clauses of both the state and federal Constitutions. (at 652)
> " . . . Due process, fundamental fairness and the integrity of our judicial system all require that counsel be permitted to pursue their client's interests with the confidence that they will not be singled out at random for sanctions . . . . [S]uch sanctions should be imposed rarely and only if the mandates of procedural due process are obeyed." (at 654)

Petitioners could find no decisions of

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[9] See Statement of the Case, Procedural Background, including in particular footnote 2, above; and footnote 11, below. The brevity required does not permit an exposition of petitioner's contentions as to which facts were erroneously adopted by the appellate court as material parts of its opinion. Such an exposition is contained in Ms. Byrd's aforesaid petition for rehearing to the appellate court.

this Court on the issue of what the mandates of procedural due process require with regard to the imposition of sanctions for prosecuting a frivolous appeal. There are, however, some federal appellate decisions which are instructive. In Hill v. Norfolk & Western Ry., 814 F.2d 1192 (7th Cir. 1987), the court held that the unquestionable right to due process in connection with F.R.A.P. 38 sanctions for a frivolous appeal does not include a right to a hearing, unless there is a factual question as to the propriety of the sanctions. In Toepfer v. Department of Transportation, 792 F.2d 1102 (C.A. Fed. 1986), in rejecting a claim that counsel were entitled to a hearing before the assessment of damages of $100 for taking a frivolous appeal, the court stated that F.R.A.P. 38 sanctions do not involve disciplinary action against an attorney

under F.R.A.P. 46(c); and that to require a hearing would augment still further the burdens created by the frivolous appeal.

There have been significant sanctions cases (although not involving Rule 38 sanctions) in which federal appellate courts have looked outside the federal rules of procedure for due process standards concerning the imposition of monetary sanctions against counsel or parties, and have reached conclusions contrary in principle to Toepfer, supra.[10] In Miranda v. Southern Pacific Transportation Co., 710 F.2d 516 (9th Cir. 1983), in which the district court invoked its inherent powers to impose sanctions of $250 on counsel for both sides for their failure, after due warning, to comply with

[10] Toepfer, supra, and the Circuit Court of Appeals opinions noted below are possibly reconcilable on the ground that the court in Toepfer was dealing with a mere $100 sanction.

a local rule regarding trial exhibits, the appellate court held that the district court does not have power to impose monetary sanctions against attorneys without affording them procedural due process that is as protective as that afforded by F.R.A.P. 46(c). In so holding, the court stated:

> . . . These procedural requirements will ensure that: (1) attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review.

Accord: Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3rd Cir. 1985). Finally, in Donaldson v. Clark, 786 F.2d 1570, reversed 819 F.2d 1551 (11th Cir. 1987)(en banc), which involved trial court-imposed F.R.C.P. 11 sanctions, following this Court's guidelines in Mathews v. Eldridge, 424 U.S.

319, 335, 96 S.Ct. 893, 903 (1976), the appellate court held that the stringency of due process requirements depends upon the nature of the case; and that the factors to be considered include (1) the circumstances in general, (2) the type and severity of the sanctions under consideration, and (3) the judge's participation in the proceedings, knowledge of the facts, and need for further inquiry. The court also held that more stringent due process requirements apply when sanctions are imposed upon a party.

Based upon the above federal authority, petitioners respectfully submit that in the instant case, the mandates of procedural due process were not obeyed, because: (1) sanctions were imposed against a party; (2) the monetary sanctions were severe--$24,000; (3) the imposition of monetary sanctions subjected the attorney

to potential professional discipline, and (4) because of the lack of a reporter's transcript and settled statement, the appellate court did not have knowledge of the facts, and hence further evidentiary inquiry was necessary.

Furthermore, petitioners submit that the mandates of substantive due process were not met. In Flaherty, supra, the court pointed out that: If the issue which an attorney is called upon to deal with is fairly debatable, under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court. Thus, the power to punish an attorney for prosecuting a frivolous appeal should be used most sparingly to deter only the most egregious conduct. In this regard, an appeal may be deemed to be frivolous only when any reasonable attorney would agree that the appeal is totally and

completely without merit. Further, an appeal is not deemed to be frivolous if any of the legal points are arguable on their merits.

In the instant case, attorney Evan S. Cohen, attorney for petitioners herein, filed an affidavit in support of Ms. Byrd's petition for rehearing in which he did not agree that the appeal was totally and completely without merit, opining that various of the points on appeal were arguable and fairly debatable on their merits, not the least of which is the alleged judicial misconduct of the trial judge.

In view of the patent judicial misconduct of the trial judge, Ms. Byrd's trial/appellate counsel was professionally obligated to raise the matter as an issue on appeal. In California, an appeal is not deemed to be frivolous if any of the legal

points are arguable on their merits. Thus, the appellate court's imposition of sanctions for the alleged prosecution of a frivolous appeal herein constitutes a denial of substantive due process. Simply, calling the appeal frivolous and awarding monetary sanctions is unreasonable and unfair.

II. A LITIGANT IS DEPRIVED OF DUE PROCESS OF LAW WHEN DURING THE SUMMATION ARGUMENT OF THE LITIGANT'S ATTORNEY, IN THE PRESENCE OF THE JURY, THE TRIAL JUDGE ON TWO SEPARATE OCCASIONS INTERRUPTS THE ATTORNEY, AND ANGRILY DEROGATES THE ATTORNEY FOR ALLEGEDLY ENGAGING IN IMPROPER ARGUMENTATION.

During the summation argument to the jury by Mr. Steinhart, Ms. Byrd's attorney, the trial judge made two explosive interruptions of counsel's argument, in which he vehemently and openly derogated

and scolded counsel in the presence of the jury. The first interruption: Prior to the summation arguments, in informal colloquy between the court and counsel, Mr. Steinhart asked the court if counsel were permitted to render argument with regard to the rules of law to be included in the court's instructions to the jury. The Court responded that such argument was permissible. Therefore, during his argument, counsel intended to argue the seriousness and solemnity of the overall burden of proof which was placed upon the will contestants as the plaintiffs in the case. In order to illustrate the weightiness of the burden of proof rule, counsel intended to point out that because the burden of proof was upon the two sets of will contestants, their two attorneys were given the advantage of arguing twice before Ms. Byrd's counsel, and twice

afterward. However, as soon as counsel embarked upon this argument by stating that counsel for the two sets of will contestants had the advantage of arguing a total of four times, as compared to Mr. Steinhart's one opportunity to argue, without having a chance to explain where he was going, the court interrupted him, vehemently scolding him for making an allegedly improper argument.[11]

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[11] In the opinion of the Court of Appeal (Appendix A), the court states that the first interruption occurred when Mr. Steinhart, "referred to the nationality of the Kalashnikov contestants, suggesting that their evidence should be viewed with suspicion because they were Russian, and when Steinhart described as 'unfair' the sequence in which the parties were permitted to argue." The appellate court is mistaken in this assertion of fact; and is mistaken in several other assertions of fact contained in its opinion. The appellate court's various factual mistakes in this regard were pointed out in Ms. Byrd's aforesaid petition for rehearing. See Statement of the Case, Procedural Background, above.

With regard to the present issue, that is, what statements by Ms. Byrd's attorney in summation argument evoked the trial

The second interruption: In his opening argument, the attorney for will contestant Kalashnikov stated that he was not a handwriting expert. During Mr. Steinhart's argument, he alluded to that statement, and went on to say that for the purposes of this case, he had made himself a handwriting expert . . . . At that point, the court angrily interrupted counsel in mid-sentence, stating that counsel was not a handwriting expert, that he was not qualified to render any opinion on that topic, and that it was improper for him to have said he was an expert.[12]

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court's first interruption, there is sworn testimony (uncontradicted by any other sworn testimony) by Mr. Steinhart and Andre S. Brummer, a percipient witness to Mr. Steinhart's summation argument, which supports the proposition that Mr. Steinhart did not make the above arguments attributed to him by the Court of Appeal.

[12] Counsel did not intend to state that he was a handwriting expert for all purposes, but that by reason of his assiduous preparation of this case, he had

Although counsel did not believe that either of his above arguments was improper, he felt he had no reasonable alternative under the tense circumstances but to humbly apologize to the court in the presence of the jury, attempt to compose himself as best as he could, and continue on with his argument; which is in fact what he did on both occasions. However, counsel was intimidated, embarrassed, and disoriented by the court's public outbursts against him. Moreover, petitioners respectfully submit that the trial judge's outbursts substantially impacted the jury adversely to Ms. Byrd's case.

With respect to this point on appeal,

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acquired handwriting expertise with regard to the handwriting of Ms. Buharov at issue in the case; and then proceed to discuss the testimony of the handwriting experts. Counsel had no intention of rendering any expert opinions, but merely to discuss and critique the expert testimony. However, by reason of the court's interruption, counsel never got to finish his statement.

the issue is not whether or not either or both of Mr. Steinhart's arguments were improper.[13] Even if they were improper, the trial court's manner of handling the situation was erroneous, and prejudicially so. Proper judicial conduct mandates that the court respectfully interrupt counsel's argument, invite counsel to the side bench, and admonish counsel there out of the presence of the jury; and thereafter, in a calm and judicious manner, admonish the jury to disregard counsel's improper comments.

In support of her petition for rehearing to the appellate court, Ms. Byrd

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[13] Assuming arguendo that the propriety of Mr. Steinhart's arguments is an issue, since there is an evidentiary dispute as to the content of those arguments (see footnote 11, above), and since there was no reporter's transcript nor settled statement, petitioners were entitled to an evidentiary hearing in which they could present sworn testimony, and cross-examine any adverse witnesses.

filed the Declaration of Andre S. Brummer, who is a percipient witness to the misconduct of the trial judge. Mr. Brummer, who has doctorate degrees in music, pedagogy and psychology, and is a noted professional musician, composer and symphony conductor, amongst other professional pursuits, testified that the trial judge twice, "angrily, with raised voice, denounced and derogated Mr. Steinhart in the presence of the jury"; and that on both occasions the judge, "interrupted Mr. Steinhart in mid-sentence, slammed his hands down on his desk, half rose to his feet leaning forward toward Mr. Steinhart, and angrily shouted at Mr. Steinhart, berating him for engaging in improper argumentation."

In none of their filings below did the will contestants contest the above description of the explosive conduct of the

trial court. Rather than deny that such yelling and derogation occurred, will contestants contended that it was invited by counsel's improper summation argumentation, and therefore was justified. Further, even the trial judge himself did not deny engaging in such misconduct. Rather, he impliedly admitted it during the oral argument on appellant's motion for new trial, wherein he tried to excuse such misconduct by alleging that Ms. Byrd's counsel had purposely bated and inveigled him into such misconduct in order to give counsel a basis to move for a mistrial, the trial judge contending that by the time Ms. Byrd's counsel had commenced his summation argument, he well knew that he could not win the case.

This contention is spurious. Obviously, if counsel had plotted to cause the trial judge to engage in judicial

misconduct to create grounds for a mistrial, counsel would immediately have moved for a mistrial as soon as the misconduct occurred; however, he did not do so. Moreover, it is presumptuous to assert that a trial attorney can beguile a trial judge to yell at him in the presence of the jury merely by making an improper argument during summation, especially since such conduct is contrary to the canons of judicial conduct. Finally, the court's contention that Ms. Byrd's counsel knew he could not win the case by the time of summation flies in the face of the above-summarized substantial percipient witness evidence adduced by Ms. Byrd, as measured against the sole evidence of will contestants, which was opinion evidence of two handwriting experts, one of whom conceded that his opinion of forgery could

be erroneous.[14]

The misconduct of the trial judge, as magnified by his spurious attempt to avoid its effect during oral argument on Ms. Byrd's motion for new trial, is ample evidence that the judge was biased against Ms. Byrd, her case, and/or her attorney. A hearing before a biased judge does not comport with fundamental concepts of due process of law. United States v. Navarro-Flores, 628 F.2d 1178 (9th Cir. 1980).

California authority with regard to misconduct of court is also instructive. 7 Witkin, California Procedure, Trial, Sec. 225 (3rd Ed. 1985):

> The trial judge should be judicial, impartial and open-minded with respect to the issues, evidence, parties, witnesses and counsel; and his manner should be temperate and courteous. Conduct which does not meet those

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[14] Further, as pointed out above, Ms. Byrd presented the testimony of a handwriting expert that all of the questioned wills were authentic.

standards may call for a mistrial, the granting of a new trial, or reversal on appeal. See Davis v. Pezel 131 C.A. 46, 50, 20 P.2d 982 (1933); Etzel v. Rosenbloom, 83 Ca.A.2d 758, 189 P.2d 848 (1948).

In Etzel v. Rosenbloom, supra at 850, 852 of the unofficial report the court held:

> The canons of judicial ethics require a judge to be courteous to counsel, temperate, attentive, patient, and not to indulge in individual idiosyncrasies in administering justice. (Canons 5, 10 and 21 of the Canons of Judicial Ethics of the American Bar Association, Vol. 62, Reports of The American Bar Association, 1937, pp. 1125, 1126 and 1130). (at 852)
>
> There is never an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, parties litigant or jurors. A judge presiding at a trial should conduct it in a fair and impartial manner, and refrain from making unnecessary comments during the course of the trial which may tend to a prejudicial result to a litigant. (at 850)

In considering the issue of misconduct of a trial judge, in Davis v. Pezel, 131 C.A. 46, 20 P. 982 (1933), the court

observed:

> . . . [W]e appreciate the difficulties and annoyances besetting any trial judge. But these considerations must yield to the principal that obtains in this state's courts that the jury must have free rein under the law to determine the facts of the case without intimation thereon from the judge. Whatever loose street criticism is current, it is nevertheless a very fortunate fact that citizens impaneled as jurors look up to and respect the person and opinions of judges presiding. They are quite apt to catch <u>even a slight prejudicial act of the judge</u> and enlarge it into a controlling feature of the case, the most careful and emphatic instructions to the contrary notwithstanding. (Emphasis added)

The type of judicial misconduct which occurred in this case certainly amounts to much more than "a slight prejudicial act of the judge." Since even a slight act of judicial misconduct can by enlarged by a jury into a controlling feature of the case, the substantial misconduct involved here should properly be held to have deprived Ms. Byrd of due process of law.

CONCLUSION

This case goes to the heart of the judicial administration of justice in our adversarial system of litigation. Here, a trial judge behaves totally out of line, causing prejudice to the case of one of the litigants. Pursuant to professional responsibility, the litigant's attorney brings the matter to the attention of the reviewing court on appeal. Instead of soundly criticizing the trial judge, the appellate court affirms the judgment, calls the appeal frivolous, and sanctions the attorney and his client in excess of $24,000. Such action by an appellate court has a chilling effect on the ardor of attorneys to confidently represent their client's interests before the courts. If it happened in this case, it has probably happened before, and will probably happen again, unless this Court makes a

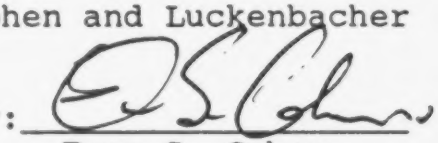
pronouncement.

Here, the patent misconduct of the trial judge has been compounded by its fervent affirmance by the appellate court. " . . . Due process, fundamental fairness and the integrity of our judicial system all require that counsel be permitted to pursue their client's interests with the confidence that they will not be singled out at random for sanctions . . . ." In Re Flaherty, supra at 654. This is especially true when an attorney is professionally obligated to bring judicial misconduct of the trial court to the attention of the appellate court.

For all of the reasons stated above, this Court should issue a writ of certiorari to review the questions presented.

Respectfully submitted,

Cohen and Luckenbacher

By: 

Evan S. Cohen
Counsel of Record

Dated: March 29, 1992

APPENDIX A

SUPREME COURT
FILED
Oct 15 1991

ROBERT N. WILSON
JAYDEE HILLBURN
Deputy Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of EUDOKIA BUHAROV, Deceased. Petitioner and Appellant, v. NICHOLAS BUHAROV et al., Contestants and Respondents.	B039082

APPEAL from an order of the Superior Court of Los Angeles County, Warren H. Deering, Judge. Affirmed and sanctions imposed.

Terran T. Steinhart, for Petitioner and Appellant.

McWhinney & McWhinney and Scott McWhinney, for Contestants and Respondents Nicholas Buharov and Tanya Buharov.

Irwin Gostin, for Contestant and Respondent Anatoliy Ivanovich Kalashnikov.

Virginia Byrd appeals from an order denying her petition for the probate of seven wills allegedly executed by Eudokia Buharov. We affirm and impose sanctions for a frivolous appeal.

FACTS

Eudokia Buharov, a Russian immigrant, came to the United States with her husband in the 1930s. Her husband died in 1971 and Buharov thereafter lived alone. She died on May 2, 1981, and no spouse, child or parent survived her.

Virginia Byrd met Buharov four months before Buharov died. Byrd (who was 42 years old) and Buharov (who was 87) became "friends." On May 22, 1981, Byrd filed a petition for the probate of two wills allegedly executed by Buharov -- a typed will dated April 1, 1981 (witnessed by Andrea Van Burns and Kirk Besoyan, neither of whom had ever seen Buharov

except on the day the will was executed and both of whom were acquaintances of Byrd) and a holographic will dated May 1, 1981 -- both naming Byrd as Buharov's sole beneficiary.

Nicholas and Tanya Buharov, the nephew and niece of Buharov's previously deceased husband, filed a will contest. Trial started in late 1984 before the Honorable Jack W. Swink, sitting without a jury, and in December 1984, Judge Swink filed a tentative decision, finding the wills were "the product of forgeries" and denying Byrd's petition. Byrd requested a formal statement of decision, but Judge Swink retired without filing one or executing a judgment based on his tentative decision. A mistrial was ultimately declared.

Prior to retrial, Byrd offered for probate five additional holographic

wills purportedly executed by Buharov on March 3, 4, and 23, April 11 and May 1, 1981.[1] In the March 23 and April 11 wills, Nicholas and Tanya Buharov were bequeathed $1 each and the remainder of Buharov's estate was left to Byrd. In each of the other wills, Byrd was the sole named beneficiary. Nicholas and Tanya Buharov contested all of the wills and, at some point, Anatoliy Ivanovich Kalashnikov,

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[1] We find particularly fascinating Byrd's testimony concerning the manner in which she came into possession of the wills -- one was received in the mail from an anonymous source, another was found by Byrd in Buharov's residence after that residence had been searched by the Los Angeles Police Department and the Public Administrator's staff, two were produced by an old friend of Byrd's who claimed to have been carrying one in his wallet for several years, and one was allegedly in the possession of Byrd's former attorneys.

In addition to the seven wills, Byrd obtained a general power of attorney purportedly signed by Buharov and a quitclaim deed to Buharov's four-unit apartment house, also purportedly executed by Buharov.

Buharov's nephew, appeared to contest all of the wills on behalf of himself and other relatives living in Russia.

The contest of all seven wills was tried in September 1988 in two phases. The first phase, tried to the court without a jury, resolved several preliminary issues, including the contestants' standing. During the second phase, a jury found that all seven wills were forgeries. Based on the jury's determination, the trial court refused to admit any of the wills to probate. Byrd's motion for a new trial was denied and this appeal followed.[2]

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[2] An eighth will has been offered for probate in the Northwest District of the Los Angeles Superior Court (Van Nuys), under a different case number and without any reference to the proceedings involving the other seven wills. That action is at a standstill, awaiting resolution of this appeal.

DISCUSSION

I.

Byrd contends the trial court was "guilty of judicial misconduct" in "twice angrily derogating and scolding [Byrd's] attorney" during his closing argument. We disagree.

The first "scolding" occurred when Byrd's attorney, Terran T. Steinhart, referred to the nationality of the Kalashnikov contestants, suggesting that their evidence should be viewed with suspicion because they were Russian, and when Steinhart described as "unfair" the sequence in which the parties were permitted to argue. Steinhart's argument constituted misconduct (Kolaric v. Kaufman (1968) 261 Cal.App.2d 20, 27-28) and it was the trial court's duty to put an end to it by admonishing counsel and instructing the jury to disregard the improper argument.

(Causey v. Cornelius (1958) 164 Cal.App.2d 269, 282; Neumann v. Bishop (1976) 59 Cal.App.3d 451, 468, fn. 4; 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, Sections 206, 208, pp. 208-211.)

The second "scolding" followed Steinhart's statement to the jury that, by virtue of his preparation for trial, he was a handwriting expert, a "fact" wholly unsupported by any evidence. The trial court correctly admonished Steinhart and instructed the jury to disregard his improper argument. (People v. Vinson (1950) 99 Cal.App.2d 100, 103.)

II.

Byrd contends the trial court erred in excluding the opinion testimony of a psychologist, Anne Saravo, PhD. We disagree.

Byrd offered Saravo's testimony to establish that Buharov's alleged

execution of seven wills, all to the same effect, within two months of her death was "reasonable and understandable behavior." The contestants objected to Saravo's testimony on grounds of relevancy and speculation. Both were well taken.

First, Saravo's testimony was not relevant to the sole issue at trial -- whether Buharov had executed all or any of the wills. The "reasonableness" of Buharov's actions had no bearing on whether she actually executed any of the wills and the evidence was properly excluded as irrelevant. (Evid. Code, Sections 210, 350.)

Second, Saravo had admitted at her deposition that she never met Buharov and the only person Saravo talked to about Buharov was Byrd. Saravo also admitted that she had no experience in evaluating the reasons someone might have for writing

more than one will to the same effect. Saravo's testimony was pure speculation and was properly excluded on that ground. (Evid. Code, Section 801, subd. (b); see, e.g., Sears, Roebuck & Co. v. Walls (1960) 178 Cal.App.2d 284, 289-292.)

III.

Byrd contends the trial court erred in admitting the videotaped deposition testimony of a handwriting expert, James Conway. We disagree.

Conway testified at the first trial before Judge Swink but when it came time for the second trial he said he was unable to attend because of prior professional commitments and personal health problems. On that basis, the contestants moved for an were granted an order allowing them to take and use Conway's videotaped deposition at trial. At Conway's deposition the following week,

where Byrd's counsel was present and extensively cross-examined Conway, it was disclosed that Conway preferred a videotaped deposition because he is responsible for the care of his blind adult son and did not wish to travel from San Francisco to Los Angeles.

In the month between Conway's deposition and trial, Steinhart did not move to vacate or modify the order permitting the use of the videotaped deposition at trial. Instead, he waited until the moment the contestants attempted to play the videotape for the jury to object that Conway was not truly "unavailable as a witness" since the infirmity relied on was not Conway's but his son's. The objection presumes a non-existent requirement of unavailability for use of a videotaped deposition. (Code Civ. Proc., Section 2025, subds.

(1)(2)(I), (u)(3)(A).)

Byrd does not suggest that the order allowing the use of the videotape was obtained by a willful misrepresentation by the contestants or their attorneys or that she was prejudiced by the use of the videotape at trial, and claims only some "disadvantage" in that the camera was not focused on Conway at all times, and that the focus on the documents was not as clear as it could have been. Byrd's complainants are specious, and there was no error.

IV.

Byrd contends the trial court should have refused to receive in evidence an affidavit of Anna Iljinichna Grasneva and Ksenia Kuzminichna Putiatova setting forth Buharov's family tree, offered by Kalashnikov to establish his standing to

contest the wills. We disagree.[3]

Subdivision (a) of section 1311 of the Evidence Code provides that "a statement concerning the birth, marriage, divorce, death, . . . relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [t]he declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received

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[3] It is clear that Byrd makes this patently frivolous argument for an ulterior purpose. The explains in her opening brief (and her attorney stressed the point at oral argument) that the prejudice resulting from the trial court's finding that the Kalashnikov contestants had standing was that their attorney participated at trial and ultimately made what Byrd considered to be the most damaging closing argument against her.

from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family."

Byrd tacitly admits that the foundational facts required by section 1311 were established by the statements made under penalty of perjury in the affidavit and cites no authority to suggest that any additional proof is required. In any event, the affiants' statements were substantiated by numerous other documents admitted into evidence without challenge by Byrd. There was no error. (Evid. Code, Section 1311, subd. (a).)

V.

Byrd contends the trial court erred in refusing to instruct the jury that a factual inference cannot be based on suspicion or speculation.[4] The error was

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[4] Byrd's proposed jury instruction stated: "A factual inference cannot flow from the non-existence of a fact; it can be

prejudicial, she says, because the instruction would have countered the contestants' theory that the woman who testified for Byrd as a witness to the execution of one of the wills might have witnessed an imposter, and not Buharov, signing a will. We disagree.

Aside from the fact that the requested instruction was essentially duplicative of one actually given (BAJI No. 2.00), the imposter argument was simply offered to explain why a witness may have convincingly testified that she saw something she did not in fact see. The statement was nothing more than an argument of counsel and the jury was instructed "that statements of counsel are not evidence." (Wilkinson v. Southern Pacific Co. (1964)

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drawn only from a fact actually established. In this regard, an inference may not be based on suspicion alone, nor on imagination, speculation, supposition, surmise, conjecture or guesswork."

224 Cal.App.2d 4768, 490 [jury presumed to have understood and correctly applied instructions].) There was no error.

VI.

Finally, Byrd contends the trial court erred in failing to send two of her exhibits, a can opener and a can of cat food, into the jury room until after the jury reached its verdict. The argument is specious.

Byrd attributes the omission of these exhibits to judicial misconduct. As the contestants explain, however, the exhibits were misplaced because Byrd's attorney failed to gather his exhibits and present them to the clerk as instructed. However, it happened, the only pertinent fact is that the opener and can were not in the jury room throughout deliberations.

But when the jury sent word that it had reached a verdict, it was requested to

return all exhibits to the court and it was then discovered that the opener and the can had not made it into the jury room. At that point, the missing exhibits were sent into the jury room, and the jury was instructed to consider all exhibits and to revote for a verdict. There is absolutely no evidence or indication that this was not done. (Millstein v. Spector (1957) 153 Cal.App.2d 125, 131 [jurors are presumed to have complied with given instructions].)

VII.

In their respondents' briefs, both the Kalashnikov and Buharov contestants request awards of sanctions against Byrd and her attorney for a frivolous appeal. (Code Civ. Proc., Section 907; Cal. Rules of Court, rule 26; National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal.App.3d 510, 524, fn. 12 [a request for sanctions made in a

respondent's brief is "fair warning that such sanctions would be considered by the court"].) Both sets of contestants assert that Byrd included in the record on appeal matters not reasonably material to a determination of the issues, and contend the appeal is frivolous, wholly without merit, and taken solely for delay.

We agree that the appeal is totally and completely without merit and that it was taken solely for the purpose of delay. (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 649-650.) All of the "errors" asserted on appeal were created by Steinhart's improper argument, actions or delay, or were asserted for an ulterior purpose, and none constituted actual error.

Delay is manifest from the record. The challenged order was made on October 24, 1988, and notice of appeal was filed December 13, 1988. The trial court

subsequently gave notice of default on appeal on two occasions based on Byrd's failure to pay for the record on appeal. Although Byrd thereafter applied for and obtained relief, she did not do so until compelled to act by reason of the notices of default. When Steinhart finally attempted to contact the court reporter to arrange payment, he learned that she had retired and her notes were lost.

In February 1990, without having paid for the record on appeal, Byrd moved in this court to set aside or vacate the judgment. (Code Civ. Proc., Sections 657.1, 914.) When the motion was denied, she moved for reconsideration. When that motion was denied, she petitioned the Supreme Court for review. That petition was denied. When Steinhart finally investigated the possibility of a settled statement in June 1990, he discovered that

the trial judge had retired and was unavailable to preside over the settled statement procedure. (Cal. Rules of Court, rule 7.) In August 1990, Byrd again moved to set aside or vacate the judgment. That motion was denied. Eventually, fees were paid and the clerk's transcript was filed. On March 13, 1991, Byrd was sent notice that her brief was due within thirty days. In May 1991, Byrd was sent a rule 17a notice. Her opening brief was finally filed later that month.

It has been ten years since Buharov died and Byrd offered the first two "wills" for probate, nearly seven years since the first trial, and three years since the second trial. The unreasonable post-trial delays by Byrd and her attorney caused significant problems resulting in further delay. These facts, considered with Byrd' patently frivolous arguments on

appeal, establish that this appeal was taken solely to harass and delay.[5]

We therefore conclude that an award of sanctions against Byrd and her attorney, Terran T. Steinhart, is appropriate. At oral argument we asked counsel for both sets of contestants to file and serve declarations setting forth their fees and costs incurred in this matter from and after the date judgment was

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[5] Steinhart was allowed to argue and respond to our questions for approximately 50 minutes. Instead of offering any justification for his conduct or that of his client, or pointing to any hint of merit lurking in the "issues" raised on appeal, he berated Judge Deering and expressed indignation because we questioned his conduct. We were not impressed, particularly since he admitted his failure to discuss with his client the potential conflict arising form the contestants' request for sanctions against both him and Byrd. The only point in Steinhart's favor is that he is not representing Byrd in the new proceeding involving the eighth will. At the same time, however, Byrd's continuing conduct demonstrates that she is fully aware of what has been going on and that sanctions against her, as well as Steinhart, are appropriate.

entered. Based on those declarations and on the conduct described above, and in order to deter similar conduct in the future, we order Byrd and Steinhart (jointly and severally) to pay, as sanctions, (1) the sum of $12,000.00 to Nicholas Buharov and Tanya Buharov and their attorneys, McWhinney & McWhinney, and (2) the sum of $12,000.00 to Anatoliy Ivanovich Kalashnikov and his attorney, Irwin Gostin.

DISPOSITION

The judgment is affirmed. Virginia Byrd and Terran T. Steinhart, jointly and severally, are ordered to pay as sanctions the sum of $12,000.00, plus the sum of $195.81 for costs, to Nicholas Buharov and Tanya Buharov and their attorneys, McWhinney & McWhinney, and the sum of $12,000.00, plus the sum of $161.65 for costs, to Anatoliy Ivanovich

Kalashnikov and his attorney, Irwin Gostin. Pursuant to section 6089, subdivision (b), of the business and professions code, the clerk of this court is directed to send a certified copy of this opinion to the State Bar of California, to the attention ofchief trial counsel, regarding the award of sanctions against Terran T. Steinhart. In addition, the clerk is directed to send a certified copy of this opinion to the district attorney of the county of Los Angeles, for investigation, if appropriate, of the conduct of Virginia Byrd.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

DEVICH, Acting P.J.

ORTEGA, J.

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 1 DATE: 11/14/91

Law Office of Terran Steinhart
Terran T. Steinhart
431 South Fairfax Avenue
4th Floor
Los Angles, CA. 90036

RE: Byrd, Virginia
vs.
Los Angeles, County of
Estate of Eudokia Buharov
2 Civil B039082
Los Angeles No. P665136

Petition for rehearing is denied.

Vogel, J.
Devich, J.

I would grant the petition.

Ortega, J.

APPENDIX C

C-25

SUPREME COURT
FILED
JAN - 8 1992

ROBERT WANDRUFF CLERK
Deputy

Second Appellate District
Division One, No. BO39082
SO17614

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

Estate of EUDOKIA BUHAROV, Deceased

VIRGINIA BYRD, Appellant

v.

NICHOLAS BUHAROV ET al., Respondents

Petition for review DENIED

LUCAS
Chief Justice

APPENDIX D

United States Constitution, Amendment XIV:

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws."

APPENDIX E

California Code of Civil Procedure, Section 907:

> **"907. [Costs on frivolous or delaying appeal.]** When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

California Rules of Court, Rule 26:

> **"Rule 26. Costs on appeal**
>
> **"(a) [Right to costs]** . . . Where the appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may impose upon offending attorneys or parties such penalties . . . as the circumstances of the case and the discouragement of like conduct in the future may require.

APPENDIX F

California Business and Professions Code, Section 6068:

"6068. Duties as an attorney.

"It is the duty of an attorney to do all of the following:

" . . .

"(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

" . . .

"(3) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)

. . . ."

APPENDIX G

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FILED MAY 2 1961
JOHN A. [illegible] COUNTY CLERK
BY [illegible] DEPUTY

LAST WILL AND TESTAMENT

665136

I, EUDOKIA BUHAROV, a.k.a. DONA BAHAROV, the undersigned, being of sound disposing mind and memory, and not acting under the fraud, duress, menace or undue influence of any person or persons whomsoever, do hereby make, publish and declare this to be my Last Will and Testament, in the manner following, that is to say:

I hereby declare that I am a resident of the City of Los Angeles, County of Los Angeles, State of California. I am a Widow, I have no natural children or living relatives. I am over eighteen years of age.

I hereby direct the payment of my expenses of last sickness and funeral expenses as soon after my decease as such payment can lawfully and conveniently be made.

I hereby give, devise and bequeath all of my estate and property, real, personal and mixed, of every nature and kind whatsoever and wheresoever situate, of which I shall die seized or possessed or of which I shall have power to dispose at the time of my decease, to my adopted daughter and best friend, VIRGINIA BYRD.

Those of my heirs, if any there be, not herein specifically mentioned, or protest this will, I grant each $1.00 (One Dollar Only).

I hereby expressly revoke all Wills and Codicils to Wills heretofore executed by me.

I hereby appoint VIRGINIA BYRD as executrix of my entire estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this, my Last Will and Testament, on this First Day of April, 1961.

[illegible] (SEAL)

CERTIFIED COPY

The foregoing instrument, consisting of two(2) pages, including this one, was, at the date thereof, by the said EUDOKIA BIHAROV, a.k.a. DONA BARAROV, SIGNED, SEALED, PUBLISHED as, and declared by her to be her Last Will and Testament, in the presence of us, who, at her request, and in her presence and in the presence of each other, have signed the same as witnesses thereto.

Inbree Evans, Residing at:

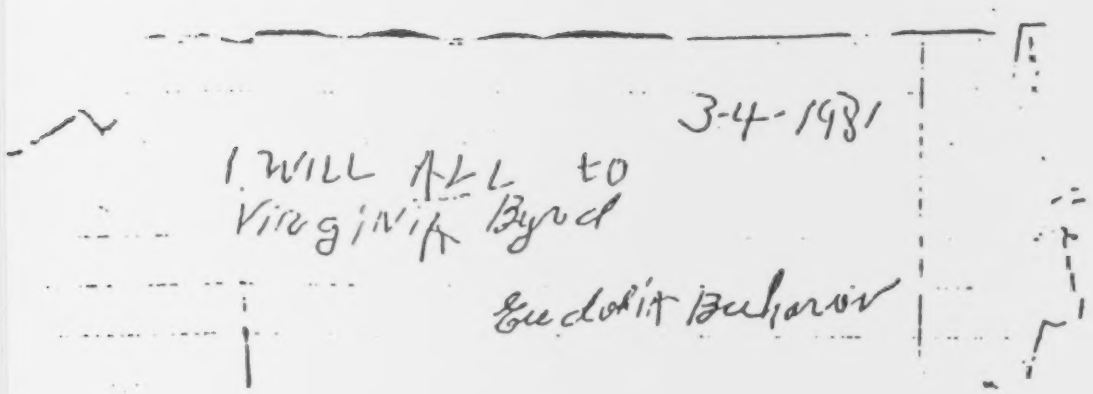
14031 Benson Street
Van Nuys, Ca 91401

Kirk K. Brown, Residing at:

R.F.D. - Box 461
Phoenix, Arizona

3.3.1981

I NO SICK LIKE BAD I WILL
ALL TO VIRGINIA Byrd SHE
Good FRIEND LADY
Love Lake & Richard


3-4-1981
I WILL ALL to
Virginia Byrd
Eudelia Behrens

3 23 81

I WILL ALL TO VIRGINIA BYRD
SHE GOOD LADY FRIEND
ONLY TOO TO NICHOLAS AND
TATIANA BUHAROV THEY TWO CALL
OR TWO TO GEORGE WHEN HE
SEE AND REFER TO ANYONE
WHO FUSS OVER ALL OR ANYTH
ING SEX WITH CRAZY THEIR
LEGAL AND THEIR ONLY
VIRGINIA BYRD TO
VIRGINIA BYRD TWO
FINE ATTORNEY TWO KNOWS FOR ALL
Enclosure

4-11-81

I WILL AL ↑ TO VIRGINIA BYRD
NICH AND TANTA BRHAIROFF GET L.O
THEY NU. CHILDS OF KENNET
THEY CHILDS FROM OTHER MAN.
NU Boys d. l. ov. TH ANYPONTST WILL
ALL MY AND MY GROIP GE
DEOPIE ARE DEAD.

Geraldine Richards

FILED MAY 22 1981 19...
JOHN J. CORCORAN, COUNTY CLERK
BY ... DEPUTY

5-1-81

665136

I WILL ALL
to Virginia
Byrd

Candolita Buhanon

S-1-81
i Eudokia Bukanov
i WILL ALL
to VIRGINIA Byrd

Eudokia Bukanov